

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**RANDY C. HUFFMAN¹, SECRETARY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Appellee,

v.

No. 34138

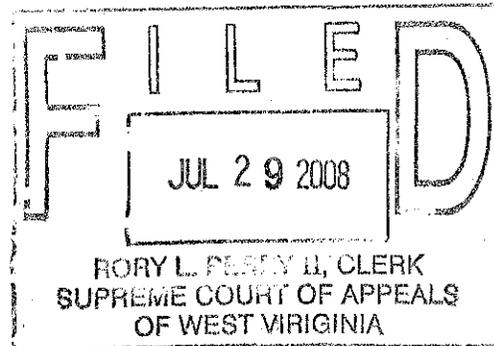
GOALS COAL COMPANY,

Appellee,

and

COAL RIVER MOUNTAIN WATCH,

**Appellant.
(Appellant Below).**



**APPELLEE, WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION'S BRIEF**

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¹The current Secretary of the Department of Environmental Protection is Randy C. Huffman. Rule 27(c)(1) of the West Virginia Rules of Appellate Procedure provides for Secretary Huffman to be substituted for Ms. Timmermeyer.

Now comes Randy C. Huffman, Secretary of the West Virginia Department of Environmental Protection (“DEP”), and pursuant to Rule 10(b) of the West Virginia Rules of Appellate Procedure files his Appellee’s Brief.

At issue in this case is precisely where the permit boundary of Goals Coal Company’s (“Goals”) surface mine permit no. D-66-82 is located. On the original permit map drawn in 1982 for this permit (“1982 map”), the boundary of the western end of the mining operation was shown to extend to an “end of mine site marker”. The boundary marker to which the map refers was put in place to mark the western-most extent of the existing mining operations at this site before the 1982 map was drawn. This boundary marker remains in its original location. Instead of using the boundary marker to locate the permit boundary, as the 1982 map would require, the Coal River Mountain Watch (“CRMW”) argues that the boundary marker is irrelevant in the determination of the location of the permit boundary. This argument is based solely on definition of the term, “permit area” in both federal and state surface mining law. To accept the CRMW’s argument, the Court must ignore the language in the federal and state definitions which requires “permit area” to be readily identifiable by appropriate markers on the site.

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

A. Revision 8 - Approval Of The Coal Silo By DEP’s Regional Office And Recision Of This Approval By DEP Headquarters

The DEP’s regional office granted Goals’ application for Revision 8 of its surface mine permit on June 30, 2005. Appeal No. 05-23-SMB CR 44.² This application sought approval for

² The instant appeal arises from the decision of the Board in its Appeal Nos. 06-15-SMB and 06-16-SMB concerning Goals’ application for Revision 9 of its permit. The substantive change in Goals’ permit sought by Revisions 8 and 9 is the same. Goals’ application for Revision 8 was the subject of a previous appeal before the Board, Appeal No. 05-23-SMB.

the construction of a coal storage silo within approximately two hundred sixty five (265) feet of Marsh Fork Elementary School. Appeal No. 05-23-SMB, CR 26; Bd. Order, p. 3, ¶ 2. Shortly after Revision 8 was approved, the DEP became aware that the maps Goals had submitted with a series of permitting actions showed the permit boundary in the western end of the permit area, where Revision 8 authorized construction of the silo, in different locations. 3/14/06 Tr. 134 - 139; *see*, Appeal No. 05-23-SMB, CR 41. Neither Revision 8 nor any of the other revisions of this permit since its original issuance have authorized a change in the permit boundary in this part of the permit area. 3/14/06 Tr. 393, 395; 3/15/06 Tr. 15 - 16, 20, 28 - 29, 67 - 68. Thus, the permit boundary in this area is unchanged from its location when permit no. D-66-82 was originally approved in 1982. *Id.*

The conflicting map depictions of the location of the permit boundary in the area where the silo was proposed raised questions as to whether the silo was within the permit boundary. Accordingly, the DEP suspended its approval of Revision 8 on July 15, 2005, pending a determination of whether the second silo was within the approved permit boundary. 3/14/06 Tr. 135; 3/15/06 Tr. 46; Appeal No. 05-23-SMB, CR 41. To assist the DEP in making this determination, it requested that Goals supply it with information to enable it to identify the

Because the Board's decision in this previous case led to the filing of the application for Revision 9 the subject of the Board's decision in Appeal Nos. 06-15-SMB and 06-16-SMB, the Certified Record the DEP filed with the Board in Appeal No. 05-23-SMB, along with the transcript of the hearing and exhibits in that case, are incorporated as part of the Certified Record in Appeal Nos. 06-15-SMB and 06-16-SMB.

A Certified Record is the "complete record of the proceedings out of which the appeal arises", which the agency is required to file with the board within 14 days after receiving notice that an appeal has been filed with the Board. W.Va. Code § 22B-1-7(e). The Certified Record is considered evidence before the Board. W.Va. Code § 22B-1-7(g). Pages in the Certified Record in Appeal No. 05-23-SMB are cited herein as "Appeal No. 05-23-SMB CR [page no.]". Pages in the Certified Record in Appeal Nos. 06-15-SMB and 06-16-SMB are cited as "CR [page no.]".

permit boundary in this area on July 19, 2005. Appeal No. 05-23-SMB CR 39. The DEP also contracted for a survey of this area with a private engineering firm. *See*, Appeal No. 05-23-SMB, CR 05 - 26. Goals submitted information in response to the DEP's July 19, 2005 request on July 25, 2005. Appeal No. 05-23-SMB, CR 27 - 38. Upon this information, the survey performed for the DEP and the conflicting boundaries shown on different maps Goals had submitted to the DEP with different permitting actions, the DEP determined that Goals had failed to make the affirmative demonstration W.Va. Code § 22-3-18(b)(1) requires as a precondition to the agency's approval of Revision 8; that the application for this revision was complete and accurate. Appeal No. 05-23-SMB, CR 02. Upon this determination, the DEP rescinded its approval of Revision 8. *Id.*³

B. Goals' Previous Surface Mine Board Appeal, Appeal No. 05-23-SMB

Goals appealed from the DEP's decision to rescind its approval of Revision 8 to the Board. This appeal was docketed as Appeal No. 05-23-SMB. The CRMW, a local citizens group, intervened. After an evidentiary hearing, the Board affirmed the DEP's decision to rescind its approval of Revision 8. 3/15/06 Tr. 142 - 145. The Board's Order in this appeal was entered May 15, 2006. Final Order, Appeal No. 05-23-SMB, CR 138 - 144. The Board

³ The CRMW mis-characterizes the basis for the DEP's decision to rescind this approval. At page 2 of its Petition, the CRMW states that the DEP made this decision "when it became apparent that the proposed silo was going to be constructed outside the permit area." The DEP never concluded that the proposed silo location was outside the permit area. Instead, it determined, based on the survey of the permit area and the conflicting boundaries shown on different maps Goals had submitted to the DEP in connection with different permitting actions that Goals had not demonstrated that the boundaries shown on the map submitted with the application for Revision 8 were accurate. The DEP did not make any conclusion as to the location of the permit boundary until it rendered a decision on Goals' subsequent application for Revision 9 of this permit.

concluded that the maps which had been submitted previously “contain inconsistencies, conflicts and ambiguities, to the extent that those maps cannot be used to identify the permit boundary along the western edge of the permit, and those maps cannot be used to determine whether or not the second silo is within or outside the permit.” Paragraph 7, Final Order, Appeal No. 05-23-SMB, CR 144. The Board ordered Goals to “promptly submit a map showing the permit boundary on the western edge of the permit”, Paragraph 8, Final Order, Appeal No. 05-23-SMB, CR 144, and to “propose to the DEP the location and placement of permanent boundary markers showing the permit boundary along Marsh Fork and adjacent to the elementary school.” Paragraph 9, Final Order, Appeal No. 05-23-SMB, CR 144. No appeal was taken from the Board’s decision in Appeal No. 05-23-SMB.

C. Revision 9 - Goals’ Second Application For Approval Of The Coal Silo

To comply with paragraphs 8 and 9 of the Board’s Order, Goals submitted an application for Revision 9 of its permit. CR 137. In this application, Goals included a new map showing permit boundaries, CR 145, proposed locations for permanent boundary markers, *see*, CR 145, and again sought approval for the construction of a coal storage silo. CR 137. On August 11, 2006, the DEP made its decision on Goals’ application for Revision 9. CR 1 - 6. The DEP agreed with the depiction of the permit boundary for the western end of the permit in the area that is near the school on the map submitted with the application and approved Revision 9 as to the location of the permanent boundary markers proposed therein. CR 2 - 4, 6. The DEP disapproved Revision 9 as to remainder of the permit revisions it proposed on other bases. CR 6.

D. The Surface Mine Board Decision That Is The Subject Of This Appeal

Goals appealed from the DEP’s decision to deny the application for Revision 9. Its appeal, Appeal No. 06-15-SMB, contested the DEP’s denial of the portion of the application

which sought approval to build a second coal silo. The CRMW also appealed from the DEP's decision on Revision 9. Its appeal, Appeal No. 06-16-SMB, the CRMW contested the portion of the DEP's decision which concluded that the map Goals submitted with Revision 9 accurately portrays the permit boundary in the western end of the permit area and approved the location and placement of permanent boundary markers proposed by Goals. The two appeals were consolidated by the Board for all purposes by the Board. Board Order entered October 2, 2006.

On March 13, 2007, the Surface Mine Board entered its Final Order in Appeal Nos. 2006-15-SMB and 2006-16-SMB. In this final order, the Board affirmed the DEP's decision to approve Revision 9 as to the depiction of the permit boundary for the western end of the permit area shown on the map submitted with the application for this revision and the location of the permanent boundary markers proposed therein. The Board's final order reversed, without modification, the decision of the DEP to deny Goals' application for Revision 9 as to the proposal to build a silo in the protected area within three hundred feet of the school.

E. The Circuit Court's Decision

The DEP and the CRMW each appealed from the Board's March 13, 2007 final order to the Circuit Court of Kanawha County, West Virginia on different grounds. These appeals were docketed as 07-AA-27 and 07-AA-56, respectively, and were consolidated before the Honorable Louis H. Bloom, Circuit Judge. The CRMW's appeal challenged the portion of the Board's final order which affirmed the DEP's decision on the map and permit boundary issues. After briefing and oral argument the circuit court rendered a decision in the case in an order entered on September 25, 2007. This order affirmed the decision of the Surface Mine Board in its entirety. Through its Petition For Appeal, the CRMW seeks to appeal from the circuit court's order. The

CRMW filed its Petition with the Clerk of the Circuit Court of Kanawha County on December 14, 2007. By order dated May 22, 2008, this Court accepted CRMW's Appeal.

II. STATEMENT OF FACTS

The coal mining division of Armco Steel Company ("Armco") built a coal preparation plant and loading facility in Raleigh County, West Virginia in the mid-1970's, before the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. §§ 1201 - 1328, was adopted.⁴ After West Virginia adopted a program of state surface mining law⁵, enabling the State to obtain exclusive regulatory jurisdiction pursuant to federal SMCRA, state regulators issued surface mine permit no. D-66-82 to Armco for this facility. Through a series of permit transfers that were approved in accordance with the State surface mining regulatory program, permit no. D-66-82 came to be held by Goals.

The boundary marker for the western end of the permit area is next to a road, at the end of a highwall that was established when material was cut to make room for the construction of the rail line into the Goals preparation plant when it was first built. 3/14/06 Tr. 53 - 54, 58 - 61, 63. This highwall was established before SMCRA was enacted on August 3, 1977. 3/14/06 Tr. 53. At that time, material that was cut away from the highwall was shoved toward Marsh Fork. 3/14/06 Tr. 53 - 54. This was done to establish a flat area where a rail line could be built for rail access to the preparation plant. *Id.* The western end of this highwall is the western-most extent

⁴ SMCRA was enacted August 3, 1977.

⁵ The West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA"), is codified in W.Va. Code §§ 22-3-1 through -32a. The state surface mining program is comprised of the WVSCMRA and the legislative rule implementing it, W.Va. Code St. R. §§ 38-2-1 through -24.

of the area that was disturbed when the surface mine permit for this site was first issued. 3/14/06 Tr. 57 - 58.

According to the engineer who was responsible for the initial permitting of the site, Clarence V. Waller, P.E., he physically placed boundary markers at the eastern and western ends of the disturbed area associated with the preparation plant facility. 3/14/06 Tr. 45 - 46. His intent was to include all of the disturbed area associated with the preparation plant as of the passage of the federal surface mining act within the markers he located on the ground. 3/14/06 Tr. 45 - 49. Waller's testimony verifies that this marker is in the same location where he initially placed it, before the site was permitted. 3/14/06 Tr. 58, 84, 94 - 95. Waller was able to confirm the location of the marker because it coincides with a physical feature on the ground, the end of the highwall. *Id.* DEP Inspector Mike Furey also verified that the marker is in the same location as when he inspected the Goals preparation plant site in the early to mid-1980's, shortly after it was first permitted. 3/14/06 Tr. 101 - 102.

The 1982 map was drawn by Waller after he had placed boundary markers at the eastern-most and western-most extent of the existing disturbance. 3/14/06 Tr. 45, 48. He sketched the area between the markers onto a "blue line" 7.5 minute USGS map that had been blown up from the USGS scale of 1" = 2,000' to the scale of 1" = 500' preferred by surface mining regulations. 3/14/06 Tr. 45, 48, 178 - 179; *see*, W.Va. Code St. R. § 38-2-3.4.1; *see*, 30 C.F.R. § 777.14(a). This map is not as accurate as one based on aerial photography or an actual survey of features on the ground. 3/14/06 Tr. 47, 157, 185 - 190. None of the features Waller placed on this map were surveyed. 3/14/06 Tr. 47, 49. The features depicted on the 1982 map do not compare well

against features depicted on more accurate maps based on surveys or aerial photography. 3/14/06 Tr. 48 - 49, 206, 269.

Waller's clear intention in placing the marker and drawing the 1982 map was to establish a permit boundary that included the disturbed area at the time the site was first permitted. 3/14/06 Tr. 45 - 46. The perimeter marker was placed in an obvious, readily identifiable location - at the end of the disturbance from the highwall that had been cut for the construction of the rail line into the preparation plant area. 3/14/06 Tr. 58, 84, 94 - 95. The material that was cut away for construction of the rail line had been shoved into Marsh Fork. 3/14/06 Tr. 53 - 54. From the perimeter marker, the boundary extended to Marsh Fork, where the disturbance from this shoved material existed. *Id.* Although the 1982 map cannot be used to locate points on the ground with precision, this map does, however, sufficiently reflect the intent that the permit boundary extend to the perimeter marker that had been placed at the end of the area that was disturbed at the time. *See*, 3/14/06 Tr. 45 - 49.

III. TABLE OF POINTS AND AUTHORITIES

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30 U.S.C. § 1291(17) *passim*

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IV. DISCUSSION OF THE LAW

A. Standard Of Review

This Court conducts *de novo* review of a circuit court’s review of administrative action.

Tennant v. Callaghan, 200 W.Va. 756, 490 S.E.2d 845 (1997); *W. Va. Division of Environmental Protection v. Kingwood Coal Company*, 200 W.Va. 734, 490 S.E.2d 823 (1997). It applies the standards of review set forth in W.Va. Code § 29A-5-4(g) to an administrative decision in the same manner as a circuit court. *Id.*

A circuit court’s review of a Surface Mine Board decision is governed by the West Virginia Administrative Procedures Act. Under W.Va. Code § 29A-5-4(g), authority to reverse an administrative decision exists when the substantial rights of the appellant have been prejudiced because the administrative decision suffers from one of six defects listed therein.

This statute states, in relevant part, that a circuit court may:

... reverse, vacate or modify the order or decision of the agency if substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable probative and substantial evidence in the record as a whole; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g). The issues the CRMW has raised in this case are purely legal ones.

The Board's conclusions on questions of law are reviewed. *de novo*. *Smith v. W.Va. Human Rights Comm'n*, 216 W.Va. 2, 602 S.E.2d 445 (2004) (Syl.Pt.1). Because the CRMW has not challenged the Board's findings of fact, the Court must evaluate the Board's decision according to the Board's findings of fact, regardless of whether the Court would have reached a different conclusion on same set of facts. *Donahue v. Cline*, 190 W.Va. 98, 437 S.E.2d 262 (1993).

B. Argument

1. Introduction

Through the artifice that is the CRMW's argument in its Petition For Appeal, the CRMW seeks to prevent Goals from building a coal silo. It seeks to establish that the land on which Goals' application for Revision 9 of its surface mine permit proposed to build this silo is not within the permit area of this permit. The CRMW would have the Court ignore that the area where the silo is proposed has been used as part of a coal preparation and shipping operation for over thirty years - since the time before federal SMCRA when no mining permit was required for these activities. The CRMW would also have the Court disregard the boundary marker that was put in place to mark the extent of this operation when the process of obtaining the first surface mine permit for this operation first began - many years before anyone had any idea that a silo might be proposed at the site.

The CRMW's argument is fundamentally wrong for at least two reasons. First, the definition of "permit area" in both federal SMCRA and the WVSCMRA requires permit area to

be determined by reference to both the approved permit map and boundary markers on the site. The boundary marker cannot be “wholly irrelevant”, as the CRMW claims it to be. CRMW Petition, p. 26. Unless the express language of these statutes is ignored, the boundary marker that has been in place at the site for years must be used, along with the 1982 map, to establish the boundary of the permit area. If this is done, the area where the silo is proposed is clearly within the permit boundary.

Second, even if the federal and state statutory definitions of “permit area” require the permit boundary to be determined solely by the 1982 map as the CRMW asserts, the silo location is within the permit area. The CRMW’s argument attempts to sever the language which requires “permit area” to be readily identifiable by appropriate markers on the site from the statutes, leaving this term to be defined solely by reference to the approved permit map. Accordingly, the CRMW contends that the boundary of the permit area shown on the approved map, the 1982 map, is a superior indicator of the permit boundary location to the in-place permit boundary marker. Even if this analysis were correct, it begs the question of how the 1982 map is to be used, by itself, to define the boundary of the permit area. This question is not answered very clearly in the CRMW’s Petition.⁶ The answer provided by the DEP’s decision on Revision 9, which the Surface Mine Board and the Circuit Court affirmed, is that the proper use of the 1982 map is to give effect to the intent of this map, which, as shown on the map’s face, was to

⁶ Before the Surface Mine Board, the CRMW contended that the proper use of the map was to “establish a boundary by superimposing a line sketched onto a USGS map in 1982, without benefit of a survey, onto a more recent map drawn from a precise survey of surface features.” Bd. Order, p. 10, ¶ 21. The CRMW would place the permit boundaries at the locations where the sketched lines from the 1982 USGS-based map fall in relation to surveyed locations on the more precise maps. Upon the facts, the Board concluded that the CRMW’s approach involved an “apples to oranges” comparison which led to absurd results. *Id.*

establish a boundary which extended to an “end of mine site marker” on the western end of the site. CR 1 - 4; Bd. Order, p. 9 - 10, ¶¶ 19 - 21; Cir. Ct. Order, p. 16. As the Circuit Court stated, “the marker is part of the map and the two cannot be divorced from one another, as CRMW argues.” Cir. Ct. Order, p. 16.

2. The CRMW’s Argument Fails Because it is Contrary to the Plain Meaning of the Statutes as Clearly Expressed by Congress and the Legislature

a. The *Chevron* Analytic Framework

The analytic framework developed by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) provides guidance in the interpretation of statutory schemes that are administered by regulatory agencies.⁷ The *Chevron* analysis is a two step process. *Id.* Importantly, the *Chevron* analysis does not proceed past the first step if the Legislature has spoken directly to an issue:

The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. No deference is due the agency’s interpretation at this stage.

Appalachian Power Co. v. State Tax Department, 195 W.Va. 573, 466 S.E.2d 424 (1995) (Syl. Pt. 3). At the first step of the *Chevron* analysis a court “looks primarily to the plain meaning of the statute, drawing its essence from the particular statutory language at issue, as well as the

⁷ This Court first applied the *Chevron* analysis under state law in *Sniffin v. Cline*, 193 W.Va. 370, 456 S.E.2d 451 (1995). Later, the Court firmly embraced the *Chevron* approach in *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

language and design of the statute as a whole.” *Appalachian Power*, 195 W.Va., at 586, 466 S.E.2d, at 437 (internal quotation marks omitted).⁸

b. Chevron Step One Analysis

In the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”), W.Va. Code §§ 22-3-1 through -32a, “permit area” is defined as follows:

Permit area means that area of land shown on the approved proposal map submitted by the operator as part of the operator’s application showing the location of perimeter markers and monuments and shall be readily identifiable by appropriate markers on the site.

W.Va. Code § 22-3-3(q) (titled “Definitions”). Thus, state law calls for the permit boundary to be determined by reference to both the approved proposal map and boundary markers at the site, not upon the map alone. The definition of “permit area” in the State statute is similar to the definition of this term in federal SMCRA. Section 701(17) of SMCRA recites that:

“[P]ermit area” means the area of land indicated on the approved map submitted by the operator with his application, which area of land shall be covered by the operator’s bond as required by section 509 of this Act and shall be readily identifiable by appropriate markers on the site.

⁸ In *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 439 (2003), the U.S. Court of Appeals for the Fourth Circuit explained the two step *Chevron* analysis:

[W]hen we confront an expert administrator’s statutory exposition, we inquire first whether “the intent of Congress is clear” as to “the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If so, “that is the end of the matter” *Ibid*. But “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843, 104 S.Ct. 2778. If the administrator’s reading fills a gap or defines a term in a way that is reasonable in light of the legislature’s revealed design, we give the administrator’s judgment “controlling weight.” *Id.* at 844, 104 S.Ct. 2778.

quoting *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995).

30 U.S.C. § 1291(17) (titled "Definitions"). Like the state statute, the federal surface mining statute calls for the permit boundary to be determined by reference to both an approved permit map and boundary markers on the site. The federal and state definitions have two elements in common. First, "permit area" is the "area of land indicated on the approved map". W.Va. Code § 22-3-3(q); 30 U.S.C. § 1291(17). Second, "permit area" shall also "be readily identifiable by appropriate markers on the site". *Id.* The plain language of the two definitions requires the location of a permit boundary to be determined by reference to both the approved map and to boundary markers on the site.

Beyond the plain language Congress used in the "permit area" definition, consideration of this definition in the context of the mapping requirements Congress established for permit applicants confirms that Congress must have intended to require that "permit area" to be defined by reference to both maps and boundary markers. In the permit content section of the law, Congress expressed a preference that the maps submitted with a permit application be drawn on a scale of 1:24,000 or 1:25,000. 30 U.S.C. § 1257(b)(13)(B). The smaller of these scales, 1:24,000, is equivalent to 1" = 500'. At this scale, it is difficult to use a map, alone, to locate points on the ground with precision. 3/14/06 Tr. 130, 136 - 137, 188, 291, 359. The width of a normal pen stroke on such a map might be equivalent to an expanse of thirty feet or more on the ground.⁹ If the precise extent of the area that is being permitted is to be identified, on-the-ground boundary markers must be used to do so.

⁹ On a map drawn at the preferred scale of 1" = 500', a distance of 1/20th of an inch on the map represents 25 feet on the ground.

The CRMW attempts to sever the portion of the permit area definition which refers to boundary markers from the rest of the definition by contending that the boundary marker portion is not really a definition, but is instead a “mandate” which has been inserted within a definition. The “mandate” distinction the CRMW attempts to manufacture here has no basis in the law and is, indeed, contrary to the plain meaning, context and structure of the law.

Both the state and federal definitions are included in a section of law which is titled, “Definitions”. W.Va. Code § 22-3-3(q); 30 U.S.C. § 1291(17). Definitions of other terms used in the law comprise one hundred percent of the other content in each of these sections. *Id.* In this context, alone, the CRMW’s contention that a “mandate” to mine operators has been slipped in to what is otherwise a “definitions” section is a bit absurd. The sense of absurdity grows stronger if one considers the structure of the federal and state surface mining laws. Congress and the Legislature included a set of “mandates” directed at mine operators elsewhere in the law, outside the respective “definitions” sections. The mandates Congress and the Legislature saw fit to include in the law are called “performance standards”. In federal law, these mandates can be found in § 515 of federal SMCRA (30 U.S.C. § 1265), which is titled, “Environmental Protection Performance Standards”. The parallel section in state law, W.Va. Code § 22-3-13, is titled “General environmental protection performance standards for surface mining; variances.”¹⁰ If

¹⁰ In footnote 5 at page 13 of its Petition the CRMW observes out that this Court and federal courts have held that the titles of the sections of a statute are not a part of the statute as adopted by the legislature. This observation either misses the point or tries to obscure it. Both the federal and state surface mining acts include a section which lists terms that are used in these acts and sets forth the meaning Congress and the Legislature declared these terms to have in the context of surface mining law. W.Va. Code § 22-3-3(q); 30 U.S.C. § 1291(17). Both the federal and state surface mining acts include a section which lists performance standards, or “mandates”, that apply to all surface mining operations. W.Va. Code § 22-3-13; 30 U.S.C. § 1265. The CRMW’s argument that boundary marker portion of the “permit area” definition is a mandate,

Congress and the Legislature truly intended the “shall be readily identifiable by appropriate markers on the site” language of the federal and state “permit area” definitions to be a mandate, and not a part of a definition, the structure of law would require that this mandate be placed among the other mandates in the performance standards sections of these laws. Importantly, there is no mention of boundary markers in either the federal or the state performance standards section of the statutes.¹¹

The CRMW’s argument would erase the “shall be readily identifiable by appropriate markers on the site” language from the federal and state definitions of “permit area”. The CRMW contentions that the permit boundary is defined solely by the maps submitted with the application, CRMW Petition, pp. 12, 14, 18, 19 and 20, and that not by boundary markers are irrelevant, CRMW Petition pp. 14 and 25, would violate a cardinal rule of statutory construction. Significance and effect must be given to every section, clause or part of the statute. *Meadows v. Wal-Mart Stores*, 207 W.Va. 203, 530 S.E.2d 676 (1999) (Syl. Pt 3). The CRMW cannot erase the plain language from the statute. Its “mandate” argument is just plain wrong.

and not really a part of this definition, is inconsistent with the structure and context of these laws. The mandates Congress and the Legislature saw fit to include in these laws were not put in their lexicons of surface mining terms. As a matter of the structure of these laws, mandates were put elsewhere.

¹¹ Later in the CRMW’s Petition, it points out that federal and state regulations include performance standards for signs and markers. See, 30 C.F.R. §§ 816.11 and 817.11 and W.Va. Code St. R. § 38-2-14.1. CRMW Petition, p. 24. That the federal Office of Surface Mining Reclamation and Enforcement (“OSMRE”) and the State have promulgated standards that boundary markers must meet does not, as CRMW suggests, establish that the inclusion of the “shall be readily identifiable by appropriate markers on the site” language in the permit area definition is a mandate that is irrelevant in determining the boundary of a permit area.

Congress and the Legislature have spoken directly to the issue of whether boundary markers are to be used in defining “permit area”. The express language of both the federal and state statutory definitions of “permit area” requires permit area to be determined by reference to both maps and boundary markers. Because the intention of the Legislature is clear, that is the end of the matter. *Appalachian Power Co. v. State Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995) (Syl. Pt. 3). The analysis does not proceed to step two of the *Chevron* framework. *Id.* The CRMW’s arguments concerning OSMRE’s rulemaking history and any possible deference to OSMRE’s purported interpretation of this term in its rulemakings can be disregarded.

c. The CRMW’s Argument Concerning Congressional Intent Leads the Court into Absurdity

The CRMW argues that the use of both boundary markers and the permit map to define “permit area” is contrary to the intent of Congress. CRMW Petition, pp. 25 - 26. It bases this argument on one of the purposes enumerated by Congress when it passed SMCRA, to “assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act.” 30 U.S.C. §1202(I). Its contention here is that maps must exclusively control the determination of permit boundaries because coal field citizens only have access to maps, and not to locations where boundary markers might be placed. The CRMW contends that the public’s right to participate in surface mining regulatory affairs would be jeopardized by using markers to which the public has no access as indicia of permit boundaries.

A first response to this argument is that the general purposes stated in 30 U.S.C. §1202 do not evince any intention to make a permit map the sole determinant of the boundaries of a permit

area. These purposes cannot negate the intent Congress expressed in the language of the definition of "permit area", which clearly requires permit area to be determined by reference to both permit maps and boundary markers. 30 U.S.C. § 1291(17). Secondly, and perhaps more importantly, the problem CRMW identifies with using boundary markers as indicia of permit boundaries - that citizens lack access to the private property where the markers are located - is no less a problem for citizens if permit boundaries are determined solely by reference to maps because in both cases citizens lack access to the boundary's location on private property. Indeed, the CRMW's position as to how the permit boundary should be determined at Goals using the 1982 map is far more impractical with regard to any right of involvement in the determination of permit boundaries a citizen may have than simply using a boundary marker to determine the location of the permit boundary. A boundary marker is a tangible object which may be capable of being seen by citizens from a vantage point which does not require them to trespass on private mine property. The CRMW's approach is to require an on-the-ground survey of the mine site to be conducted and then determine the permit boundary by superimposing a map drawn from the survey upon the permit map. The absurdity here is that if citizens have no right of access which would allow them to approach the perimeter of the permit area where they could see a boundary marker, then they certainly have no right of access which would allow them to go into the permit area, set up a transit amid heavy equipment and large truck traffic and conduct a survey. Simply looking for a permit boundary marker which locates the permit boundary would be far more

practical and less absurd for citizens than the approach advocated by the CRMW.¹² It is also the approach mandated by the law.

Another absurdity with the CRMW's position is that, as recognized by the Board, the CRMW's approach would have the "end of mine site marker" shown on the 1982 map in a steep area on the undisturbed hillside, excluding area that has been used continuously as part of the preparation plant operation at this site since before SMCRA was enacted from the permit, but including within the permit area forested hillside that has never been disturbed by mining. Bd. Order, p. 10, ¶ 21; *compare* Appeal No. 05-23-SMB CR 24 and Appeal No. 05-23-SMB CR 35; *see* 3/14/06 Tr. 155, 357. Such absurd interpretations of the law are to be avoided whenever possible. *Expedited Transportation Systems, Inc. v. Vieweg*, 207 W.Va. 90, 529 S.E.2d 110 (2000). Notably, even CRMW's counsel admitted that this approach is absurd. *See*, 3/15/06 Tr. 63.

3. The CRMW's Arguments Must Fail Because it Appealed Only One of the Two Bases on Which the Board Rejected its Arguments Below

A conceptual flaw with the CRMW's position is that the Board's decision in this case rejects the arguments the CRMW made before it on two bases and, when the CRMW appealed the Board's decision to the circuit court, it took issue with only one of these bases. Upon the

¹² The circumstances of this case illustrate the absurdity of the CRMW's position perfectly. If the law compels use of the 1982 map as the *sole* determinant of the location of Goals' permit boundaries, as the CRMW contends, any reference to any other indicia of the location of the permit boundaries, including the mapping from more recent surveys of the Goals site, would be prohibited. A citizen who goes to the Goals site and attempts to ascertain the location of the permit boundary, looking at the 1982 map only, would have no choice but to look for the "end of mine site marker" which the 1982 maps shows to be the western-most end of the permit boundary. The CRMW's 1982 map-as-the-sole-determinant argument would prohibit comparison of the approved 1982 map to any other more recent (and unapproved) map.

plain language of the federal and state laws defining “permit area”, the Board correctly rejected the CRMW’s arguments that the permit boundary marker cannot be used to define permit area. Bd. Order, p. 7, ¶¶ 13 - 15. This part of the Board’s decision was the sole focus of CRMW’s circuit court appeal. In addition, however, the Board rejected the manner in which the CRMW would use the 1982 map to define the permit boundary. Bd. Order, p. 10, ¶ 21.

In its petition for appeal and opening brief before the circuit court, the CRMW did not take issue with, or even mention, the Board’s findings and conclusions as to how the 1982 map is to be used to determine a permit boundary. On this point, the Board acknowledged the CRMW’s argument as to how the boundary should be determined from the 1982 map - that the boundary lines drawn on this map should be superimposed on the ground as shown in a map drawn from a more recent, more accurate survey and be proclaimed to be the permit boundary. Bd. Order, p. 6, ¶ 12 and p. 10, ¶ 21. Then, the Board expressly rejected the notion that a permit boundary should be determined from the 1982 map in this manner. Instead, it held that this map should be applied to give effect to the intent behind it:

The Board finds that CRMW’s argument fails because the argument misinterprets and misapplies the original permit map. Instead of carrying out the clear intent of this map, which was to establish a permit area which extends to an “end of mine site marker” on the western end of the permit area which was at the western most extent of the area disturbed for this mining operation which [sic] the permitting requirement of the law came into effect, 3/14/06 Tr. 45 - 49, the CRMW would frustrate this intent. It would instead establish a boundary by superimposing a line sketched on a USGS map in 1982, without benefit of a survey, onto a more recent map drawn from a precise survey of surface features. Beyond requiring a true “apples to oranges” comparison, the CRMW’s approach leads to absurd results. Its approach would have the “end of mine site marker” shown on the map in a steep area on the undisturbed hillside, excluding area that has been used continuously as part of the preparation plant operation at this site since before SMCRA [Surface Mine Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 - 1328] was enacted, but including forested hillside that has never been disturbed by mining.

Bd. Order, p. 10, ¶ 21. The Board's conclusion that the only proper way to use this map is to determine the permit boundary according to the intent behind this map, which was for the permit boundary to extend to the end of mine site marker, was not appealed to circuit court. Based on this aspect of the Board's decision, even if the 1982 map is the sole determinant of the permit boundary, application of this map in the manner required by the Board's uncontested conclusion results in extension of the permit boundary to the end of mine site marker, placing the silo location within the permit boundary. By not contesting these conclusions in its petition for appeal and opening brief before the circuit court, the CRMW has waived any right it had to contest this aspect of the Board's decision in this court. W.Va. Code § 29A-5-4(e).

Even if the CRMW had appealed this aspect of the Board's decision, this conclusion is supported by ample evidence and is consistent with the law. On its face, the 1982 map shows that the permit boundary extends to an "end of mine site marker". Appeal No. 05-23-SMB CR 35. The engineer who drew the map, Clarence V. Waller, P.E., testified that his intent in drawing the map was to establish a permit boundary that extended to the location marked by the "end of mine site marker". 3/14/06 Tr. 45 - 46. Waller physically placed boundary markers at the eastern and western ends of the disturbed area associated with the preparation plant facility. 3/14/06 Tr. 45 - 46. His intent was to include all of the disturbed area associated with the preparation plant as of the passage of the federal surface mining act within the markers he located on the ground. 3/14/06 Tr. 45 - 49.

The Board's conclusion as to how the 1982 map should be used to locate the permit boundary is also consistent with the law. Just as in the case of anything else that is committed to written form, the goal when interpreting the map should be to give effect to the intent of the map.

Belcher v. Powers, 212 W.Va. 418, 573 S.E.2d 12 (2002)(Syl. Pt. 2)(in construing a deed, will or other written instrument, effect must be given to the intent of the parties). *Columbia Gas Transmission Corp. V. E.I. du Pont de Nemours & Co.*, 157 W.Va. 1, 217 S.E.2d 919 (1975) (intent governs construction of ambiguous contract); *Antco, Inc. v. Dodge Fuel Corp.*, 209 W.Va. 644 550 S.E.2d 622 (2001) (release of liability ordinarily covers only such matters as may be fairly said to have been within the contemplation of the parties); *Francis O. Day Co. v. Director, Div. Of Environmental Protection*, 191 W.Va. 602, 443 S.E.2d 602 (1994) (primary purpose in construing a statute is to give effect to the intent of the legislature). Intent governs the construction of all other written instruments. The rule should be no different for construction of a map.

4. Response To CRMW's Other Arguments

a. The Federal OSMRE Cannot Interpret the Clearly Expressed Intent of Congress Out of Existence Through Promulgation of Regulations

The CRMW argues that the history of OSMRE's regulations dealing with the concept of "permit area" evince a regulatory interpretation which is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). CRMW Petition, pp. 16 - 19. As pointed out above, the CRMW's case fails at step one of the *Chevron* analytic framework. Only at step two of the *Chevron* analysis, which cannot be reached in this case because Congress has clearly and directly spoken to the precise issue before the Court, can deference to OSMRE's exposition of the law through regulations it has promulgated be considered.

Notwithstanding that deference to agency interpretation is not an issue here, some observations about what the CRMW claims to be OSMRE interpretations may be useful to a better understanding of the issues in this case. First, despite the CRMW's characterization of the positions OSMRE has taken in proposing and promulgating the various definitions of "permit area", no where in any of the Federal Register discussions of these definitions does OSMRE make the definition/mandate distinction that CRMW attempts to further with this discussion. Throughout OSMRE's Federal Register discussions of the rules it has promulgated on various subjects, it mentions mandates which have their origins in various statutory provisions in SMCRA. However, the statutory origin of most of the "mandates" OSMRE discusses is § 515 of SMCRA (30 U.S.C. § 1265), the performance standards section. None of the "mandates" discussed by OSM originate in the permit area definition section, 30 U.S.C. § 1291(17). The definition/mandate distinction CRMW attempts to make with regard to the language of this statutory definition is purely a product of its imagination.

Second, among all of the issues discussed by OSMRE in its Federal Register discussions of its "permit area" regulations, none of these issues have involved how the definition might be used to determine a disputed permit boundary. Instead, such discussions are generally oriented toward the manner in which the definitions it has proposed or promulgated either: (1) fit into the many contexts in which this term is used in the various statutes and regulations in which it appears or (2) interact with other related terms OSMRE has attempted to define.

Third, for the most part, the "permit area" definitions OSMRE has proposed or promulgated are forward-looking definitions which can readily be applied to mining operations that are authorized to begin after the definition's promulgation. Much more problematic is the

manner in which these definitions can be applied to mining operations that were in existence before the regulations were promulgated. Notably, the Goals location was in existence even before SMCRA was enacted. Instead of examining the Goals location in light of *ex post facto* regulations, it should be examined in light of how the statutory provisions of SMCRA (i.e., 30 U.S.C. 1291(17)) apply to this site when they took effect.

Fourth, the current definition of “permit area” in OSMRE’s regulations requires that all lands that are disturbed by mining operations be included in the “permit area”. 30 C.F.R. § 701.5. The land at issue here, that which lies between what the CRMW contends is the permit boundary and the permit boundary that the DEP, Surface Mine Board and circuit court have approved based on the boundary marker, has been continuously disturbed by activities that are considered “surface mining operations” since before SMCRA was enacted. These activities have included rail access to the Goals preparation plant site and maintenance of sediment ponds in the area. Accordingly, application of this definition, as quoted by CRMW beginning at the bottom of page 17 of its Petition, actually defeats the CRMW’s case by requiring the area the CRMW attempts to exclude from Goals’ permit to actually be included in the permit area there.

b. CRMW’s Argument that the DEP “Misconstrues the Statute and Would Render West Virginia Law Inconsistent with Federal Law” is Based Solely on Mis-characterizations of the DEP’s Position and the Law

Both the federal and State definitions of “permit area” are stated in the conjunctive. “Permit area”: (1) “means that area of land shown on the approved proposal map” and (2) “shall be readily identifiable by appropriate markers on the site.” W.Va. Code § 22-3-3(q); 30 U.S.C. § 1291(17). Under both, the requirement that a permit boundary be determined by reference to

boundary markers is, at a minimum, co-equal with the requirement that such a boundary be determined by reference to a map. There is absolutely no issue as to inconsistency between federal and state surface mining laws in this case. DEP has always construed the federal and state definitions of "permit area" consistently. A very basic problem with the arguments the CRMW makes in this section of its Petition. (CRMW, Petition, pp. 20 - 22.) The purported conflict with federal law that the CRMW attempts to set up does not exist. This "conflict" is based on the CRMW's mis-construction of the federal definition, which can only be reached if one totally ignores that, in addition to defining "permit area" by reference to the approved permit map, the federal definition of "permit area" also states clearly that it "shall be readily identifiable by appropriate markers on the site."

c. CRMW's Assertion that the Law Requires Boundary Markers to Reflect What is on the Map, Not Vice-Versa, Ignores the Plain Language of the Statutory Definition and Reality

This argument, CRMW Petition, pp. 24 - 26, is based on the portion of the state and federal regulations for "Signs and Markers" which require boundary markers to be in place "prior to initial disturbance". W.Va. Code St. R. § 38-2-14.1.b and 30 C.F.R. §§ 816.11(d) and 817.11(d). First, and importantly, an examination of the regulations upon which the CRMW relies shows that maps are not even mentioned therein. Accordingly, there is no legal basis in these regulations for the alleged requirement that boundary markers reflect what is on the map. Second, as pointed out above, application of these regulations to Goals is problematic because the reality is that there was disturbance which constituted "surface mining operations" at the Goals site before either these regulations or the statutes came into effect. The regulations are clearly written with a view toward mining operations which start *after* their promulgation. Third,

as also stated above, the federal and state statutory definitions contain two parts, neither of which is superior to the other. "Permit area": (1) "means that area of land shown on the approved proposal map" and (2) "shall be readily identifiable by appropriate markers on the site." W.Va. Code § 22-3-3(q); 30 U.S.C. § 1291(17). Accordingly, this argument is wholly without merit.

**d. CRMW's Permanent Maps Versus "Transitory" Markers
Argument is Neither a Legal Nor a Practical Issue Here**

The CRMW also argues is that boundary markers should not be used as indicia of permit boundaries because they are capable of being moved by mine operators. The problem with this argument is that, while this may be true and may be a practical problem, it is a policy argument that should have been made in the halls of Congress when the "permit area" definition was being drafted. Congress chose to define "permit area", in part, by reference to boundary markers. The CRMW's policy argument cannot justify ignoring the law as it is written.

Notably, in this case this practical problem of "transitory" boundary markers is not as significant as it might be elsewhere. The evidence is that the original location of the boundary marker at issue coincides with a physical feature on the ground, the end of a highwall that was established when the operation was initially built so rail lines could be laid to provide access to the site. Bd. Order, p. 9, ¶ 20; 3/14/06 Tr. 58, 84, 94 - 95. By locating the end of this highwall, the person who originally placed the boundary marker, Clarence Waller, and the DEP's inspector for this operation in its early days, Mike Furey, could verify that the current location of the marker is the same as its original location. Bd. Order, p 8, ¶ 17; 3/14/06 Tr. 58, 84, 94 - 95, 101 - 102. Should this marker ever be knocked down by moving mine equipment as might be found at

this site, it can be easily be re-installed to accurately reflect the permit boundary because its location coincides with the end of this highwall.

5. The Case of *A&S Coal Co., Inc. v. OSM* is Persuasive Authority

The CRMW contends that the Interior Board of Land Appeals case of *A&S Coal Co., Inc. v. OSM*, 96 IBLA 338, 1987 WL 110563 (I.B.L.A.) is not persuasive. In *A&S* an Office of Surface Mining (hereinafter "OSM") inspector wrote a notice of violation regarding, in part, disturbance of an off-permitted area. The inspector testified that after discovering surface disturbances, vehicles and equipment, stockpiled coal and road use outside of what he believed to be the permitted area, he paced off the distances prior to writing the violation. *Id.*, at 344. The CRMW suggests that the area involved was part of boundary revision that had already been approved by the OSM and that the current maps showed the disputed area as being part of the permitted area. *See* Appellant's Brief, p. 33. This is incorrect. In actuality, OSM did not receive the correct map until two days after the NOV was written. *A&S, supra*, at 344, 345. This key fact means that the inspector wrote the violation based upon an older map which indicated that the road, equipment, coal etc. was outside the permitted area. In overturning the violation, the Interior Board, regarding the new road, said this:

However, the permit designated the access road, and the access road was included as a part of the disturbed area for calculation of the bond amount. We must conclude that, while not marked on the map as being within the boundaries of the permit area, it was clearly marked and there is ample evidence of A&S's intent that it be a part of the permitted area. *Id.*, at 345.

While obviously not binding upon this Court, the Board's reasoning is certainly persuasive. The Board clearly stated that the road **was not** on the map relied upon by the

inspector, but that it was **clearly marked** and that there was ample evidence of the operator's **intentions** regarding where the permit area should be. The parallels to this matter are clear.

Both the Surface Mine Board here and the Interior Board relied on markings on the ground and the operators intent in making their decision.

The Board finds that CRMW's argument fails because the argument misinterprets and misapplies the original permit map. Instead of carrying out the clear intent of the map, which was to establish a permit area which extends to an "end of mine site marker" on the western end of the permit area which was at the western most extent of the area disturbed for this mining operation which the permitting requirement of the law came into effect, 3/14/06 Tr. 45 - 49, the CRMW would frustrate this intent. It would instead establish a boundary by superimposing a line sketched on a USGS map in 1982, without benefit of a survey, onto a more recent map drawn from a precise survey of surface features. Beyond requiring a true "apples to oranges" comparison, the CRMW's approach leads to absurd results. Its approach would have the "end of mine site marker" shown on the map in a steep area on the undisturbed hillside, excluding area that has been used continuously as part of the preparation plant operation at this site since before SMCRA was enacted, but including forested hillside that has never been disturbed by mining.

Goals Coal Company and Coal River Mountain Watch v. Stephanie Timmermeyer, Secretary, West Virginia Department of Environmental Protection, Appeal Nos. 06-15-SMB and 06-16-SMB, Surface Mine Board Order dated March 13, 2007.

As a result, the *A&S* case is more persuasive than the Appellant suggests.

6. That Congress Chose to Define "Permit Area" and, Accordingly, Permit Boundaries by Reference to Boundary Markers is Reinforced by the Law Dealing with Property Boundaries Generally

Although this case is clearly controlled by the definitions of "permit area" in the federal and state statutes, Congress' choice to define "permit area", in part, by reference to boundary markers is consistent with the law otherwise dealing with property boundaries generally. This consistency reinforces the conclusion that Congress intended permit boundary markers to be used

to establish the boundaries of “permit area”. Where indicia of property boundaries conflict, monuments are entitled to great weight. *Somon v. Murphy Manufacturing & Erection Company*, 160 W.Va. 84, 232 S.E.2d 524 (1977). The general rule in boundary disputes is that monuments, natural and artificial, prevail over courses and distances or mistaken descriptions of lands in surveys or conveyances. *West Virginia Pulp and Paper Co. v. L. Natwick & Co.*, 123 W. Va. 753, 21 S.E.2d 368 (1941). In locating boundaries of land, resort is to be had first to natural landmarks, next to artificial monuments, then to adjacent boundaries, and last to courses and distances. *Bain v. Woods*, 145 W.Va. 297, 115 S.E.2d 88 (1960); *Conner v. Jarrett*, 120 W.Va. 633, 200 S.E. 39 (1938). A plat or map that is obviously erroneous will yield to other descriptions, especially where it is contrary to the evident intent of the grantor. *Clonch v. Tabit*, 122 W. Va. 674, 12 S.E.2 521 (1940).

V. CONCLUSION

There is an obstacle CRMW must overcome before interpretation of the statutory definition of “permit area” becomes an issue. It did not appeal from the Board’s conclusion that the only way the 1982 map can be used to determine a permit boundary is by giving effect to the intent of this map, which the Board further concluded was to establish a permit boundary that extended to the permit boundary marker. Accordingly, it is bound by this conclusion and cannot contest it for the first time before this Court. A permit boundary which is established in this fashion includes the area of the silo within the permit. So, even if CRMW could prevail on its argument that the portion of the statutory definition of “permit area” which requires permit area to be determined by reference to permit boundary markers is irrelevant and must be ignored, the

CRMW cannot prevail as to its ultimate goal in the case, which is to establish that the proposed silo location is outside the permit boundary.

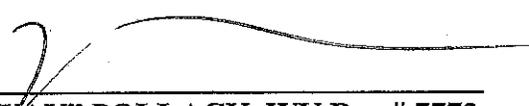
Of course, CRMW cannot prevail on the issue of how the "permit area" definition is to be interpreted, either. Its construction requires a portion of Congress' carefully chosen language to be ignored. Congress spoke clearly and directly to the issue of whether boundary markers are to be used to help define "permit area" when it stated that permit area "shall be readily identifiable by appropriate markers on the site". 30 U.S.C. § 1291(17). Under the analytic framework of the *Chevron* case, the task of statutory interpretation does not proceed past this point.

The Circuit Court and Surface Mine Board's decisions as to the location of the permit boundary and proposed boundary markers at Goals must be affirmed.

Respectfully submitted,

**WEST VIRGINIA DEPARTMENT OF
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

RANDY C. HUFFMAN, SECRETARY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellee,

v.

Case No. 34138

GOALS COAL COMPANY,

Appellee,

and

COAL RIVER MOUNTAIN WATCH,

Appellant.

(Appellant Below).

CERTIFICATE OF SERVICE

I, A. M. "Fenway" Pollack, counsel for the West Virginia Department of Environmental Protection, do hereby certify that I served a copy of the foregoing **Appellee, West Virginia Department of Environmental Protection's Brief** on the 29th day of July, 2008, via U. S. Mail, postage prepaid, to the addresses listed below:

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